DOCUMENT RESUME

ED 427 622 HE 031 877

AUTHOR	Ingram, Richard T.
TITLE	A Guide to Conflict of Interest and Disclosure. The Fundamentals. Board Basics.
INSTITUTION	Association of Governing Boards of Universities and Colleges, Washington, DC.
PUB DATE	1997-00-00
NOTE	20p.
AVAILABLE FROM	Association of Governing Boards of Universities and Colleges, One Dupont Circle, Suite 400, Washington, DC 20036; Tel: 202-296-8400; Tel: 800-356-6317 (Toll-Free); Fax: 202-223-7053; Web site: http://www.agb.org (members: $5.95 single copy; 10 or more, $3.95 each; nonmembers: $9.95 single copy; 10 or more, $7.95 each).
PUB TYPE	Guides - Non-Classroom (055)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Conflict of Interest; Decision Making; Disclosure; Ethics; *Governance; *Governing Boards; Guidelines; Higher Education; *Policy Formation; Role Conflict

ABSTRACT

This booklet offers guidelines for conflict of interest issues and disclosure for members of governing boards of institutions of higher education. It urges institutions to develop conflict-of-interest policy documents to guide decisions concerning such topics as defining what constitutes "conflict of interest"; the board's role in cases of an "appearance" of conflict of interest; when a perceived conflict of interest should be addressed; who is responsible for requesting board attention and action; maintaining balance in light of the need to seek members who are influential people with diverse affiliations; and whether board policy should specify most possible conflicts of interest. A general guideline offered suggests that any time a trustee or institutional officer (or family member or business associate) stands to gain financially (either directly or indirectly) from a specific transaction, there is a potential conflict of interest. Examples of relatively easy and more difficult situations are offered. The booklet warns that policy guidelines and annual disclosure requirements should strike a balance between being overly prescriptive or so vague that they are easily ignored or ineffective. Also provided are some criteria for defining conflict of interest, as well as a sample conflict of interest policy statement. (DB)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

A Guide to Conflict of Interest and Disclosure

College and university trustees increasingly are held to high standards of personal behavior, as are members of other nonprofit, tax-exempt organizations. Higher education is receiving its share of adverse public and media attention for questionable—albeit isolated—practices. As public scrutiny becomes more intense, ethical issues grow more complex, more difficult, and therefore, necessary to resolve.

Governing boards must develop sound conflict-of-interest and disclosure policies to guide individual trustees, chief executives, and senior administrators. Faithful and consistent adherence to such policies will go a long way to preserving the integrity of institutions *and* boards.

A growing number of institutional governing boards have adopted policy statements to guide their actions and to make clear their intentions with internal and external campus stakeholders. Although the majority of boards of private institutions have adopted policies outlining potential conflicts of interest, public boards are more often required by law to take an additional step: Their members frequently are mandated to disclose their assets and business ties. Indeed, voluntary disclosure of possible conflicts is becoming the norm in private higher education.

Recent AGB research shows that 60 percent of public institutions required board members to file a statement regarding their assets or business affiliations, but only 16 percent of private institutions did so. The survey reported that 48 percent of public and 58 percent of private boards included definitions of conflict of interest for board members in their bylaws, adopted separate policy statements, or did both. These data indicate the trend is moving in the right direction.

DISCLOSURE AND THE SENSIBLE RESOLUTION OF POTENTIAL CONFLICTS IN A REASONABLE, CLEAR, AND BUSINESSLIKE MANNER ARE IN EVERYONE'S BEST INTERESTS, MOST ESPECIALLY THE INSTITUTION'S.

Matters of potential conflict almost always involve extenuating factors that must be weighed. Only individual governing boards can address and resolve such factors through common sense and consistent good judgment. It is wise to do so on a case-by-case basis, thus preventing the possibility that a specific incident is handled in an overly prescriptive fashion. Nevertheless, board members can adopt appropriate general policies to guide their ultimate judgments. Such broad policy guidelines should reflect answers to these challenging questions, among others that may be unique to individual institutions:

- What is a conflict of interest, and what is not?
- Should the board be concerned about the *appearance* of a conflict to stakeholders? If so, should the board consistently treat apparent conflicts in the same manner as actual conflicts?
- When should a perceived conflict be addressed as if it were valid?
- Who within the governing board's leadership or committee structure should be assigned responsibility to request board attention and action on a given issue?
- How does an institution maintain balance on these matters, considering that effective boards are obliged to seek members who are influential people with diverse personal and professional affiliations?
- Is it in the institution's best interest to specify in board policy most or all possible conflicts of interests? Is it possible to achieve such a goal? Is a more general statement preferable?

Questions of conflict involving institutional leaders are important because *all* volunteer leaders and salaried officials are "trustees" and caretakers of the institution in the sense that they act on behalf of the public good—not for themselves, their families, friends, or business associates. As such, institutional leaders have legal, moral, and ethical responsibilities to protect the institution's integrity.

More specifically, individual members of governing boards have a clear duty to protect themselves, their fellow trustees, and their institution from situations that can result in embarrassment to themselves or vulnerability to lawsuits. The governing board is the institution's legal owner and final authority and holds the institution's assets—including its reputation—in trust for future generations. From a practical vantage point, colleges and universities are exposed to conflicts of interest—real or perceived—all the time. Thus, disclosure and the sensible resolution of potential conflicts in a reasonable, clear, and businesslike manner are in everyone's best interests, most especially the institution's.

Ambiguities concerning what should and should not constitute a conflict of interest are inevitable. These occupy the gray area between the *absolute* of explicit federal and state law and the *flexibility* trustees need to define their own values and standards of good conduct when illegalities are not at issue. In the end, most matters of real or perceived conflict of interest must be resolved through the exercise of good judgment by the majority of trustees once full disclosure is made by the individual or individuals concerned and considered by the board. There is no place for dysfunctional politeness in the boardroom on matters of conflict and on moral and ethical issues.

A general rule of thumb is that any time a trustee or institutional officer, family member, or business associate stands to gain financially (either directly or indirectly) from a specific transaction involving the institution, it is a potential conflict and should be treated as such by the affected individual(s)—*and the board itself*. Transactions that involve money or other tangible assets are the most serious but tend to be the easiest to resolve (or should be).

Brokering or providing legal services, insurance products, banking and investment services, products sold on campus, and similar transactions—even when provided at a discount—may or may not constitute an appropriate transaction for a given institution and governing board. Mitigating circumstances may include these examples:

- Was a timely and recorded disclosure made to allow full board discussion and resolution?
- If appropriate and feasible, was a bidding process or other disinterested selection process conducted? Are such processes routinely and periodically followed?
- Did the affected party or parties absent themselves from the final discussion and refrain from voting on the relationship and its terms?

There are many uncomfortable situations, some more serious than others. It is not uncommon for a trustee to have to decide between continuing his or her trusteeship and realizing a direct or indirect financial gain. Unfortunately, it also is commonplace for boards to accept mere disclosure of a current or pending transaction for the record (in committee or board minutes) as an acceptable resolution of a potential or real conflict. *It is not*, even when the affected party may be an attorney who says it is! The simple act of disclosure is not in itself a review or a remedy; it is only a means to an end, not an end in itself. Put another way, it remains *for the board* to decide—in private—whether a particular situation is acceptable *after disclosure has been made and all the pertinent facts are considered.*

At the other end of the continuum are the easy situations. Is it a conflict of interest for a trustee to participate in the customary board vote to accept the faculty's recommendations for the class of students, including his or her son or daughter, who have met graduation requirements? Of course not! Is it a conflict of interest for a trustee to receive reasonable and customary reimbursement for direct expenses incurred for the use of his or her local restaurant for occasional board dinners? Surely not! Our appropriate concerns about conflicts can go too far, just as they cannot go far enough. There is no substitute for the use of common sense.

The tough issues are in the middle of the continuum. They often involve the trustee who considers himself the institution's "general counsel" and takes no fee for his personal time, yet his firm gets the lion's share of the institution's legal business. Or the trustee who has been the institution's insurance broker for many years and who would be offended if the business officer or the board were to call for competitive shopping for comparable or better products with the help of another broker as a disinterested party. Or the trustee who is a principal with a marketing firm and who offers a deep discount if his firm is selected without a bidding process to develop a new strategy to attract students. Or the trustee whose company has been allowed to manage $10 million of the endowment and receives fees approaching $300,000 annually.

CONFLICT POLICY AND PROCEDURES ARE THE BOARD'S BUSINESS; THE BOARD AND ITS ELECTED LEADERS MUST KEEP THEIR HOUSE IN ORDER.

Ordinarily, the board leader most responsible for protecting the president or chancellor from personal and professional involvement in the resolution of conflicts and potential conflicts is the board chair, aided by an appropriate board committee and institutional legal counsel. The appropriate board committee to oversee the conduct of an annual trustee and institutional officer disclosure process and implementation of the board's conflict policy ordinarily is either the executive committee or the committee on trustees. The chief executive always should be kept at arms length from resolving conflict-of-interest and related ethical and moral issues involving trustees. And the same principle arguably is relevant for the board or university secretary as well. Conflict policy and procedures are the board's business; the board and its elected leaders must keep their house in order.

BEST COPY AVAILABLE

More often than they do, governing board members should say "No" to fellow trustees who have conflicts, and "No" to serious matters that would be perceived as conflicts by reasonable stakeholders. They should call for competitive bidding processes more often. They should more often help their colleague trustees decide between continuing as trustees or competing with other product or service providers. And governing board members never should assume that simple disclosure or even recusal will necessarily absolve them of the responsibility to decide the relevant facts of a situation by considering three basic questions:

- Is the situation, on its face, a disallowable conflict?
- Is the situation, although not a clear conflict, of sufficient importance to justify disallowance because of possible embarrassment to the institution or the board?
- Is the situation deemed not to be a conflict of interest, or is it deemed to be of such clear and compelling benefit to the institution that the position or wishes of the trustee or institutional officer in question should be supported (with the reasons stated in board minutes)?

POLICY GUIDELINES AND ANNUAL DISCLOSURE REQUIREMENTS SHOULD STRIKE A BALANCE BETWEEN BEING OVERLY PRESCRIPTIVE AND SO VAGUE THAT THEY ARE EASILY IGNORED OR INEFFECTIVE.

The following includes additional thoughts about how to define conflict of interest, an illustrative policy that can be adapted to different institutional settings with the help of legal counsel, and an illustrative disclosure form that a governing board also can adapt and use as an annual requirement for all trustees and senior institutional officers. The form serves to remind everyone that should a potential conflict occur in light of the board's general policy, it must be disclosed promptly to the board chair, who then should refer the matter to the appropriate board committee for discussion. The committee then may refer it to the full board for disposition.

"Conflict of Interest" Defined. A potential conflict of interest is a situation that involves a personal, familial, or business relationship between a trustee or institutional officer and the institution that can cause the institution to be legally (or otherwise) vulnerable to criticism, embarrassment, or litigation in the opinion of responsible stakeholders. Real and perceived conflicts of interest involve ethical or moral values, to be sure, but they are distinguishable and much more visible because of two factors, one or both of which may be present:

1. They usually involve money or profit or otherwise bear on the fiduciary responsibility of the board to ensure no trustees or institutional officers use (or are perceived to use) their institutional affiliations for personal financial gain, except as institutional policy may *explicitly* allow.

2. They usually involve one or more aspects of the institution's programs, real property, personnel, or auxiliary enterprises.

The following additional illustrative considerations may guide board members as they develop or revise policies:

- Trustees are the final authority of the institution, subject only to regulatory oversight by the state attorney general and other public authorities. The chief executive and senior administrators are responsible for calling problems or potential problems to the attention of appropriate board members, committees, or the full board, *and not for resolving those problems.*

- Policy guidelines and annual disclosure requirements should strike a balance between being overly prescriptive and so vague that they are easily ignored or ineffective. How much detail should a policy contain about nepotism? Should a trustee be permitted to serve as the institution's general counsel (even without direct compensation) if his or her firm receives periodic or substantial legal fees for services rendered? Is it a conflict for a local bank president to serve on the board when all or most of the institution's accounts are maintained in that bank—even though other banks offer comparable services? Under what circumstances should the institution purchase desirable real estate owned by a trustee? What principles should guide business transactions between the institution and relatives of trustees?

- The board's bylaws should include a definition of conflict of interest and refer to a separate and more comprehensive board policy on the subject. This policy should reflect the requirements of applicable state law and be sensitive to federal tax law considerations as well, notably in the area of "private inurement." Trustees and institutional officers should be required to sign an annual disclosure statement. These documents should be included in a portfolio of materials for the prospective trustee before he or she accepts nomination and is considered for board membership.

- Specific conflict-of-interest situations deemed important enough to call to the board's attention should be documented and described in reasonable detail in the minutes of the board meeting or executive committee meeting. To help protect all involved, the individual involved should be absent from substantive discussions and any subsequent votes. Any actions the board takes—including the reasons the board may decide no conflict exists—should be spelled out.

- Boards should apply the "headline test" when deciding if a matter is of sufficient importance to warrant it being a conflict or a perceived conflict. Board members should ask this question: In the event the matter is called to the attention of the media, can the president or board chair easily explain or defend the board's action—or decision not to act?

ED 427 622

BOARD BASICS

THE FUNDAMENTALS

A GUIDE TO CONFLICT OF INTEREST AND DISCLOSURE

BY RICHARD T. INGRAM

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

AGB

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

2B

LB 2331.72

ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES

BEST COPY AVAILABLE

Conflict-of-Interest Policy for [Institution Name]

1. Scope. The following statement of policy applies to each member of the board and to all officers of [institution name]. It is intended to serve as guidance for all persons employed by the institution in positions of significant responsibility and authority, including (but not limited to) the following: [list categories of positions or institutional titles.]

2. Fiduciary Responsibilities. Board members, officers, and employees of [institution name] serve the public trust and have a clear obligation to fulfill their responsibilities in a manner consistent with this fact. All decisions of the board and officers of the administration and faculty are to be made solely on the basis of a desire to advance the best interests of the institution and the public good. The integrity of [institution name] must be protected at all times.

Men and women of substance inevitably are involved in the affairs of other institutions and organizations. Effective boards, administrations, and faculties will include individuals who have relationships and affiliations that may raise questions about perceived conflicts of interest. Although many such potential conflicts are and will be deemed incon sequential, every individual trustee and senior administrator has the responsibility to ensure the entire board is made aware of situations that involve personal, familial, or business relationships that could be troublesome. Thus, the board requires each trustee and institutional officer annually (a) to be familiar with the terms of this policy; (b) to disclose to the board chair any possible personal, familial, or business relationships that reasonably might give rise to a conflict involving the university; and (c) to acknowledge by his or her signature that he or she is in accordance with the letter and spirit of this policy.

3. Disclosure. All trustees and officers are requested to list on this form only those substantive relationships (a) they or members of their family maintain with organizations that do business with the university, or (b) that potentially could be construed to affect their independent, unbiased judgment in light of their decision-making authority and responsibility.

If a trustee or officer is uncertain whether to list a particular relationship, the board chair and institutional legal counsel should be consulted. They may elect to seek the judgment of the executive committee (or the committee on trustees) before informing and consulting with the entire board within an executive session. Information shared or gathered as a result of such consultations (including information provided on this form) shall be confidential except when the institution's best interests would be served by disclosure. Such disclosure will be made only after informing those concerned.

The following definitions are provided to help trustees and officers decide whether a relationship should be listed on the disclosure:

- Business Relationship: One in which a trustee, officer, or a member of his or her family as defined below serves as an officer, director, employee, partner, trustee, or controlling stockholder of an organization that does substantial business with [institution name].

- Family Member: A spouse, parent, sibling, child, or any other relative if the latter resides in the same household as the trustee or officer.

- Substantial Benefit: When a trustee or a member of the trustee's family (a) is the actual or beneficial owner of more than 5 percent of the voting stock or controlling interest of an organization that does substantial business with the university or (b) has other direct or indirect dealings with such an organization from which the trustee or a member of the trustee's family benefits directly, indirectly, or potentially from cash or property receipts totaling $10,000 or more annually.

4. Restraint on Participation. Trustees or officers who have declared a conflict of interest, or who have been found to have a conflict of interest, shall refrain from participating in consideration of proposed transactions unless the board or administration requests information or interpretation for special reasons. Should a conflict of interest matter require an executive committee or board vote to resolve, those concerned shall not be present at the time of the vote.

Disclosure Form for [Institution Name]

1. Are you aware of any relationships between [institution name] and yourself or a member of your family as defined by the letter or spirit of this policy that may represent a conflict of interest?

☐ No ☐ Yes

If Yes, please list such relationships and the details of annual or potential financial benefit as you can best estimate them.

_____

_____

_____

2. During the past 12 months, did you or a member of your family receive any gifts or loans from any source from which the university buys goods or services or otherwise has significant business dealings?

☐ No ☐ Yes

If Yes, please list them, their source, and their approximate value.

Source	*Item*	*Approximate Value*

3. Exceptions: (If there are none, please indicate so.)

_____

I certify that I have read and understand the board's policy on conflict of interest (dated _____), and that the foregoing information is true and complete to the best of my knowledge.

_____

Name *(please print)*

_____

Signature Date

(Please return the completed form in the preaddressed envelope provided.)

13

CLOSING OBSERVATIONS. The action of the New York State Board of Regents in February 1997 to remove 18 of the 19 trustees of Long Island's Adelphi University reminds all trustees of independent colleges and universities that they serve the same public trust as the trustees of public academic institutions and other tax-exempt organizations. As trustees, we all are held to higher standards of conduct than other citizens.

Private colleges and universities never have been immune from public criticism and always have been expected to abide by local, state, and federal laws and regulations. But in recent years, it has become obvious (sometimes painfully so) that once-acceptable or tolerable behavior in boardrooms by individual trustees is no longer either acceptable or tolerable. The reputations of many private colleges and universities have been irreparably harmed by one or more trustees whose boards, in turn, condoned, ignored, or rationalized conflicts of interest that may have been legal but bordered on the unethical. Like it or not, it is a new day.

Why should a trustee be denied the opportunity to compete for his or her institution's business? Perhaps trustees should not be, but a crucially important word in the foregoing question is *compete*. As boards resolve this issue, they also must consider a related question: Is it really possible for institutional officers to hold vendors and providers to normal performance standards and expectations, knowing that the vendor or provider is a trustee or is related to a trustee? There is the rub.

Colleges and universities are expected to be on the highest possible moral and ethical road in all of their doings. It is more than arguable that the teaching of good values begins with trustees and senior institutional officers; adopting and consistently adhering to sound conflict-of-interest and disclosure policies is essential. This is a complex and evolving set of issues, of course, but this guide may serve to heighten our individual and collective sensitivities to them.

Resources

Board of Regents of the University of the State of New York. Report of its decision to dismiss 18 of 19 trustees of Adelphi University. Albany, N.Y.: 1997.

Commission on the Academic Presidency. *Renewing the Academic Presidency: Stronger Leadership for Tougher Times*. Washington, D.C.: AGB, 1996.

Ingram, Richard T. *Effective Trusteeship: A Guide for Board Members of Independent [Public] Colleges and Universities*. Washington, D.C.: AGB, 1995.

Ingram, Richard T. & Associates. *Governing Independent [Public] Colleges and Universities*. San Francisco: Jossey-Bass and AGB, 1993.

Futter, Victor and George W. Overton. *Nonprofit Governance: The Executive's Guide*. Chicago: American Society of Corporate Secretaries and the American Bar Association, 1997.

Overton, George W. (editor). *Guidebook for Directors of Nonprofit Corporations*. Chicago: ABA, 1993.

This publication is part of **Board Basics**, an AGB series devoted to strengthening the effectiveness of governing boards and trustees. Board Basics comprises several topic clusters—The Fundamentals, Financial Matters, Fund-Raising, Academic Affairs, Leadership, Strategic Decision Making, and Effective Committees—each of which contains several booklets. Several assumptions underlie the series:

- Academic trusteeship grows increasingly ambiguous, and trustees need concise, accessible, and focused information to help them carry out their complex fiduciary and stewardship responsibilities.
- Basic principles of trusteeship remain constant across higher education, regardless of institutional type, size, and mission. The series highlights these general principles to provide trustees with a core of knowledge they can apply to their individual institutions.
- The series addresses the distinguishing characteristics of academic trusteeship, especially as it differs in scope, substance, and focus from corporate directorships and other board service.

AGB and the authors welcome comments and suggestions to improve this publication and others in the series. Call AGB publications at 800/356-6317 or visit our Web site at http://www.agb.org for more information.

Association of Governing Boards
of Universities and Colleges

One Dupont Circle • Suite 400
Washington, D.C. 20036
http://www.agb.org